No. 92-896

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

THUNDER BASIN COAL COMPANY,
a Delaware corporation,

Petitioner,

v.

LYNN MARTIN, as Secretary of Labor, United States Department of Labor; WILLIAM J. TATTERSALL, as Assistant Secretary of Labor For Mine Safety and Health; WILLIAM HOLGATE, as District Manager of District No. 9, Coal Mine Safety and Health Administration of the United States Department of Labor; Mine Safety and Health Administration of the United States Department of Labor,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Circuit erred in holding, contrary to decisions of the Sixth and Fourth Circuits, that the Mine Safety & Health Act precludes federal district court jurisdiction to hear a challenge, on constitutional and federal question grounds, to an agency's application of the Mine Act which directly conflicts with a statutory right granted under a separate federal statute over which that agency has no jurisdiction.

2. Whether, in the absence of preclusionary statutory language, federal district courts have subject matter jurisdiction to hear pre-enforcement challenges on constitutional and federal question grounds to agency actions outside the domain of expertise of the enforcing agency.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION OF THE TENTH CIRCUIT IN THIS CASE DIRECTLY CONFLICTS WITH DECISIONS OF THE SIXTH AND FOURTH CIRCUITS HOLDING THAT SUBJECT MATTER JURISDICTION EXISTS IN FEDERAL DISTRICT COURTS TO RESOLVE CONSTITUTIONAL AND FEDERAL QUESTION CHALLENGES TO ADMINISTRATIVE ACTIONS UNDER THE MINE ACT	6
II. THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING QUESTION CONCERNING FEDERAL DISTRICT COURT JURISDICTION TO HEAR A PRE-ENFORCEMENT CHALLENGE ON CONSTITUTIONAL AND FEDERAL QUESTION GROUNDS TO ADMINISTRATIVE ACTS WHERE THE ISSUE IN DISPUTE IS OUTSIDE THE DOMAIN OF EXPERTISE OF THE AGENCY INVOLVED	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 9, 10, 11, 12, 13

Bituminous Coal Operators Association, Inc. v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977) 6, 8, 9, 11

Central Hardware Co. v. NLRB, 407 U.S. 539 (1972) 13

Council of Southern Mountains, Inc. v. Donovan, 516 F. Supp. 955 (D.D.C. 1981) 11

Gardner v. Toilet Goods Association, 387 U.S. 167 (1967) 12

Hudgens v. NLRB, 424 U.S. 507 (1976) 13

Lechmere, Inc. v. NLRB, ___ U.S. ___, 112 S. Ct. 841 (1992) 13

Leedom v. Kyne, 358 U.S. 184 (1958) 12

Mathews v. Eldridge, 424 U.S. 319 (1976) 5, 11, 12

NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) 13

Rusk v. Cort, 369 U.S. 367, 379-80 (1962) 10

Secretary of Labor and UMWA v. Jim Walton Resources, 7 FMSHRC Dec. 1348 (1985), *affirmed* 822 F.2d 1134 (D.C. Cir. 1987) 13

Southern Ohio Coal Co. v. Donovan, 774 F.2d 693 (6th Cir. 1985), *amended* 781 F.2d 57 (6th Cir. 1986) 5, 6, 7, 8, 11

UMWA v. Peabody Coal, 7 FMSHRC Dec. 1357 (1985), *affirmed*, 822 F.2d 1134 (D.C. Cir. 1987) 13

Whitney National Bank v. Bank of New Orleans & Trust Co., 379 U.S. 411, 85 S. Ct. 551, 13 L. Ed. 2d 386 (1965) 7

Ziegler Coal Co. v. Marshall, 502 F. Supp. 1326 (S.D. Ill. 1980) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 2
28 U.S.C. §§ 2201-2202 2
29 U.S.C. § 141 3
30 U.S.C. § 801 3
30 U.S.C. § 816(a) 9
30 U.S.C. § 820(a) 4
30 U.S.C. § 820(b) 4
30 U.S.C. §§ 820(c), (d) 4

REGULATIONS

30 C.F.R. PART 40 4

No. _____

In The

Supreme Court of the United States

October Term, 1992

THUNDER BASIN COAL COMPANY,
a Delaware corporation,

Petitioner,

v.

LYNN MARTIN, as Secretary of Labor, United States Department of Labor; WILLIAM J. TATTERSALL, as Assistant Secretary of Labor For Mine Safety and Health; WILLIAM HOLGATE, as District Manager of District No. 9, Coal Mine Safety and Health Administration of the United States Department of Labor; Mine Safety and Health Administration of the United States Department of Labor,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Thunder Basin Coal Company[1] ("Thunder Basin") respectfully prays that a Writ of Certiorari issue

[1] Thunder Basin Coal Company, a wholly-owned subsidiary of Atlantic Richfield Company, has no subsidiaries.

to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

This case arises from decisions of the United States District Court for the District of Wyoming granting Thunder Basin's Motion for Preliminary Injunction (App. pp. 24-30) on March 21, 1991 and denying the Secretary of Labor's Motion to Dismiss (App. pp. 19-23) on May 20, 1991. The Judgment and Opinion of the Tenth Circuit (App. pp. 1-16), reversing the District Court's decisions, was entered on July 20, 1992. 969 F.2d 970 (10th Cir. 1992). Thunder Basin's timely Petition for Rehearing with Suggestion for Rehearing En Banc was denied on August 28, 1992 (App. pp. 17-18).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 2201-2202 and 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Thunder Basin asserts a violation of the due process clause of the fifth amendment of the United States Constitution. The issues also present a conflict between two

federal statutes: the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 141, *et seq.*, and the Federal Mine and Safety Act of 1977 ("Mine Act"), 30 U.S.C. § 801, *et seq.* The provisions of the Mine Act involved appear in the Appendix (pp. 31-35).

STATEMENT OF THE CASE

Thunder Basin owns and operates the Black Thunder Mine near Wright, Wyoming. The mine began operations in 1977 and now has approximately 500 employees.

The United Mine Workers of America ("UMWA") has unsuccessfully sought to unionize the production employees of Thunder Basin. The employees rejected the UMWA by a vote of 307 to 56 in a National Labor Relations Board election in 1987, the only union election held among the mine's employees.

Thunder Basin does not recognize any union as a representative of its employees. It exercises its right under the LMRA to deny non-employee union organizers access to its property and records.

In October 1990, the UMWA initiated new tactics in its ongoing efforts to unionize the Black Thunder Mine. It sought to have itself and two of its staff organizers, neither of whom were employees of Thunder Basin, each designated under the Mine Act as a "representative of miners". This designation authorized the union and its employees serving as the "representative of miners," *inter alia*, to enter the mine premises, to review company

records, to request inspections and to participate in government inspections of the mine.[2]

Thunder Basin protested this designation to the Mine Safety and Health Administration ("MSHA") on the ground that it compromised Thunder Basin's LMRA rights to exclude non-employee union organizers from its premises and records. MSHA officials rejected Thunder Basin's protest, advising Thunder Basin by letter of March 11, 1991 that it must proceed to recognize the designation of the UMWA and its organizers as a "representative of miners."

Faced with the explicit threat of a citation, potential severe penalties and a long series of administrative and review proceedings in order to protect its right to exclude union organizers from its mine, Thunder Basin sought injunctive relief in federal district court.[3] The district

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[2] Designation as a "representative of miners" does not require or connote majority representation of a company's employees. As few as two mine employees may seek the designation of a representative of miners. 30 C.F.R. Part 40.

[3] Under the Mine Act, a mine operator may initiate the administrative hearing process only after receiving a citation. If a citation is upheld, a civil penalty of $50,000 must be assessed. 30 U.S.C. § 820(a). A further penalty of up to $5,000 may also be assessed for each day of noncompliance. 30 U.S.C. § 820(b). Criminal penalties may be imposed on individuals and the mining company. 30 U.S.C. § 820(c), (d).

Thunder Basin's refusal to accept the UMWA designation as representative of miners would, as MSHA acknowledged to the district court, result in a citation. A similar refusal at a mine adjacent to Thunder Basin, the Jacobs Ranch Mine of Kerr McGee, resulted in MSHA threatening the imposition of the maximum per day penalty then in effect during the pendency of the administrative proceedings. Kerr McGee capitulated under that threat. (App. pp. 13-14; Verified Complaint ¶30).

court found that the primary issues raised by Thunder Basin – MSHA's refusal to recognize important rights granted to Thunder Basin under the LMRA and MSHA's imposition of an administrative process subjecting Thunder Basin to "considerable fines and penalties" while Thunder Basin sought administrative review to protect its LMRA rights – presented matters of federal statutory conflict and constitutional due process which MSHA had "no expertise to resolve." (App. pp. 21, 28). The district court, relying on *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985), *amended* 781 F.2d 57 (6th Cir. 1986), held that the Mine Act's judicial review provisions did not deprive it of subject matter jurisdiction to resolve these claims. The district court held, based on the authority of *Southern Ohio Coal* and *Mathews v. Eldridge*, 424 U.S. 319 (1976), that Thunder Basin did not have to exhaust its administrative remedies before a determination of the issues presented here, which it found were beyond the agency's domain of expertise. (App. p. 22). It granted the preliminary injunction and denied the government's motion to dismiss.

The Tenth Circuit reversed, specifically rejecting the Sixth Circuit's holding in *Southern Ohio Coal* and finding that the district court had no subject matter jurisdiction to hear a pre-enforcement challenge concerning the Mine Act.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE TENTH CIRCUIT IN THIS CASE DIRECTLY CONFLICTS WITH DECISIONS OF THE SIXTH AND FOURTH CIRCUITS HOLDING THAT SUBJECT MATTER JURISDICTION EXISTS IN FEDERAL DISTRICT COURTS TO RESOLVE CONSTITUTIONAL AND FEDERAL QUESTION CHALLENGES TO ADMINISTRATIVE ACTIONS UNDER THE MINE ACT.

The Tenth Circuit held that the district court had no subject matter jurisdiction to resolve a pre-enforcement challenge to administrative actions concerning the Mine Act. As the opinion of the Tenth Circuit acknowledges (App. p. 8), this holding is in direct conflict with the Sixth Circuit's decision in *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693 (6th Cir. 1985), *amended* 781 F.2d 57 (6th Cir. 1986). It also conflicts with the Fourth Circuit's decision in *Bituminous Coal Operators' Association, Inc. v. Secretary of Interior*, 547 F.2d 240 (4th Cir. 1977). Both Circuit Courts held that the Mine Act's judicial review provisions do not preclude federal district courts from hearing pre-enforcement challenges to agency actions involving federal questions outside the domain of expertise of the administrative agency.

In *Southern Ohio Coal*, a mine operator sought district court relief against an administrative procedure under the Mine Act requiring the operator, prior to any hearing, to reinstate miners previously terminated. The Sixth Circuit found the district court had subject matter jurisdiction to determine the pre-enforcement constitutional challenge to this process. The Court recognized that the Mine Act " . . . does not expressly preclude district court

jurisdiction." *Id.* at 700.[4] It referenced Supreme Court authority noting the unsuitability of administrative proceedings for the resolution of constitutional questions and, after recognizing that the Mine Act "does not expressly preclude district court jurisdiction," held that Congress had not precluded federal district court jurisdiction over important federal questions concerning the Act which were beyond the "domain of agency expertise." 774 F.2d at 700. It concluded:

> In *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 85 S. Ct. 551, 13 L. Ed. 2d 386 (1965), the Supreme Court explained that the purpose behind limited statutory review of administrative decisions is "to permit agency expertise to be brought to bear on particular problems." *Id.* at 420, 85 S. Ct. at 557. Thus, when the issue to be adjudicated is one that is within the domain of agency expertise, then the statutorily provided judicial review procedure is exclusive. Questions concerning the constitutionality of rules or statutes, however, are not the type of questions that are within an agency's domain of expertise. Rather, responsibility to deal with questions of constitutional interpretation lies in the federal courts, both at the trial and appellate levels.

Id.

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[4] The court in *Southern Ohio Coal* distinguished the Mine Act from statutes in which Congress clearly prohibited district court jurisdiction – demonstrating that Congress has used very different and clear language to manifest a specific intention to preclude the general jurisdiction of the district courts. *See Id.* at 700.

The Tenth Circuit here made no attempt to distinguish *Southern Ohio Coal*; instead, it expressly repudiated the conclusion and rejected each of the "three reasons" it characterized as "justifications" for the Sixth Circuit's finding. (App. p. 8). Specifically, the Tenth Circuit "rejected" *Southern Ohio Coal*'s finding that Congress had not precluded federal district court jurisdiction, concluding instead that judicial review of Mine Act controversies was exclusively restricted to courts of appeals after exhaustion of administrative proceedings. (App. p. 8). It also directly rejected *Southern Ohio Coal*'s determination that constitutional issues are outside the domain of agency expertise, finding that nothing in the Mine Act distinguishes between challenges based on constitutional as opposed to other grounds. (App. pp. 8-9). Finally, it flatly disagreed with *Southern Ohio Coal*'s conclusion that the administrative process was not adequate for the resolution of the constitutional question presented. (App. pp. 8-9). Accordingly, the Tenth Circuit totally repudiated the rationale of *Southern Ohio Coal* and found no subject matter jurisdiction existed in the district court. This determination is directly and irreconcilably in conflict with *Southern Ohio Coal*.

In *Bituminous Coal*,[5] mine operators brought a pre-enforcement challenge to a regulation making mine operators responsible for the Mine Act violations committed by the construction companies they engaged. The Fourth

[5] *Bituminous Coal* was brought and decided under the legislative predecessor to the Mine Act of 1977. The judicial review language in each statutory version regarding court of appeals review is essentially identical.

Circuit upheld the subject matter jurisdiction of the federal district court over this challenge. The Court rejected the government's argument that pre-enforcement review was prohibited by 30 U.S.C. § 816(a). It concluded that the "Act neither states nor implies" that the post-enforcement review procedure for citations and administrative orders provide the "exclusive procedure" for access to the courts. *Id.* at 243. It found that "other procedures," including pre-enforcement challenges, were "not precluded" by the statute and, citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-41 (1967), held that subject matter jurisdiction existed to hear the pre-enforcement challenge of the mine operators. *Id.*

The Tenth Circuit here reached a directly contrary result. It found a legislative intent to preclude pre-enforcement review, but it did so by relying on statutory language and legislative history relating only to post-enforcement judicial review procedures.[6] Not only does the Tenth Circuit's decision conflict directly with *Bituminous Coal*, but its rationale is inconsistent with *Abbott Laboratories*, 387 U.S. 136 (1967), where this Court was

[6] The legislative history of the 1977 Mine Act shows that Congress was cognizant of the Fourth Circuit decision in *Bituminous Coal*. The substantive aspect of the decision was cited with approval in the 1977 Mine Act legislative history. S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted* in 1977 U.S.C.C.A.N. 3401, 3414. Though Congress reassessed district court review of civil penalty orders issued after exhaustion of the administrative process, *Id.* at 44, it made no effort to prohibit pre-enforcement review permitted by *Bituminous Coal*.

"wholly unpersuaded" by the contention that the presence of a comprehensive post-enforcement review procedure for agency determinations evidenced a clear congressional purpose to bar district court jurisdiction over pre-enforcement challenges.[7] *Id.* at 141. Quite apart from the Tenth Circuit's misplaced reliance on the legislative history of the post-enforcement judicial review process, the Tenth Circuit's decision here is nothing more than a flat disagreement with the Fourth Circuit regarding the appropriate determination of legislative intent from the statutory language.

The Tenth Circuit's decision in this case directly conflicts with those of the Sixth and Fourth Circuits on the precise issue of federal district court subject matter jurisdiction over pre-enforcement challenges concerning the Mine Act.[8] This important issue has been the subject of

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[7] In *Abbott Laboratories*, this Court reaffirmed the presumption in favor of judicial review by holding that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141 (*quoting Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)). "[A]n aggrieved person will not be cut off [from judicial review] unless there is a persuasive reason to believe that such was the purpose of Congress." *Id.* at 140. The Court found that post-enforcement judicial review provisions "were simply intended to assure adequate judicial review of such agency decisions, and that their enactment does not manifest a congressional purpose to eliminate judicial review of other kinds of agency action." *Id.* at 144.

[8] Although the Tenth Circuit here did not directly address the issue of exhaustion of administrative remedies, the tenor of its decision was that the administrative remedies were adequate and should be exhausted. In that respect, as well, its decision conflicts with both the Sixth and Fourth Circuit determinations

conflicting decisions in the lower courts, as well. *Ziegler Coal Co. v. Marshall*, 502 F. Supp. 1326, 1330 (S.D. Ill. 1980) (finding jurisdiction existed); *Council of Southern Mountains, Inc. v. Donovan*, 516 F. Supp. 955, 959 (D.D.C. 1981) (finding no jurisdiction). This Court should grant certiorari to resolve the conflict.

II. THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING QUESTION CONCERNING FEDERAL DISTRICT COURT JURISDICTION TO HEAR A PRE-ENFORCEMENT CHALLENGE ON CONSTITUTIONAL AND FEDERAL QUESTION GROUNDS TO ADMINISTRATIVE ACTS WHERE THE ISSUE IN DISPUTE IS OUTSIDE THE DOMAIN OF EXPERTISE OF THE AGENCY INVOLVED.

The decision below raises an important and recurring question of federal law – *i.e.*, the standard by which federal district courts may assert jurisdiction to resolve pre-enforcement challenges to controversies arising from an administrative process. This Court in numerous cases has affirmed district court jurisdiction to hear pre-enforcement challenges to administrative action despite the existence of a comprehensive legislative scheme for court of appeals review after complete administrative proceedings. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Gardner*

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directly holding that exhaustion was not required in the face of the constitutional and federal question claims that were outside the agency's expertise. *Southern Ohio Coal Co.*, 774 F.2d at 701-702; *Bituminous Coal Operators' Association*, 547 F.2d at 244.

v. Toilet Goods Association, 387 U.S. 167 (1967); *Leedom v. Kyne*, 358 U.S. 184 (1958).

In each of the above-referenced cases the Court recognized that Congress had provided a comprehensive judicial review process based upon complete administrative proceedings, agency determination and order, and subsequent review in the courts of appeals. In none was there a specific statutory reservation of federal question jurisdiction in the federal district courts. In each, however, the Court found district court jurisdiction in the absence of a clear and convincing congressional purpose to preclude federal district court jurisdiction.[9] *See Abbott Laboratories*, 387 U.S. at 139-141. In each, jurisdiction was recognized to prevent the deprivation of a legislative right or the imposition of a significant hardship. In each, exhaustion of administrative remedies was deemed unnecessary in the context of the potential hardship.

The decision of the Tenth Circuit below veers sharply from the guidance of these cases to the detriment of judicial fairness and efficiency and to the direct peril of Thunder Basin. The hardship to Thunder Basin and the federal questions presented in its challenge are as real and material as those affecting the challengers in the referenced cases.

Thunder Basin is challenging action by a government agency which seeks to deprive it of an important right granted by another federal law regulated by a separate federal agency. That right – to prevent nonemployee

[9] Indeed, in *Mathews*, this Court found jurisdiction even in the presence of congressional intent to deny jurisdiction.

union organizers from access to nonunion plant premises and records – is a right recognized and affirmed by this Court for nearly 40 years. *Lechmere, Inc. v. NLRB*, ___ U.S. ___, 112 S. Ct. 841 (1992); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). Seeking to protect that right in an administrative proceeding before the Federal Mine Safety and Health Review Commission is an act of futility, for the Commission has previously declined to address issues arising under the LMRA.[10] Moreover, defending the right in an administrative proceeding would subject Thunder Basin to the risk of very substantial fines and penalties. The same administrative agency has already used the threat of such fines and penalties to force a mine adjacent to Thunder Basin to surrender the same LMRA rights Thunder Basin seeks to protect (*supra*, p. 4 n.3). The administrative demand for capitulation of an important legislatively-granted right, at the risk of substantial fines and penalties for non-capitulation, raises a significant question of fundamental fairness and due process. The district courts are, as this Court has noted, more appropriate for the efficient and competent resolution of those matters which are beyond the domain of expertise of the agencies. *Abbott Laboratories*, 387 U.S. at 154.

The conflict in the circuits shows that the issue presented here is recurring. It is important to determine

[10] *UMWA v. Peabody Coal*, 7 FMSHRC Dec. 1357 (1985) and *Secretary of Labor and UMWA v. Jim Walton Resources*, 7 FMSHRC Dec. 1348 (1985), *consolidated* and *affirmed*, 822 F.2d 1134 (D.C. Cir. 1987).

whether, and under what standards, federal district courts can hear pre-enforcement challenges which raise constitutional and other significant federal questions beyond the competence and domain of expertise of the agency involved. This case presents the issue squarely, and certiorari should be granted to resolve this issue now for the future benefit to judicial fairness, efficiency and economy.

CONCLUSION

Petitioner Thunder Basin respectfully prays that this Court grant a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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TABLE OF CONTENTS – APPENDIX

Page

CONTENTS

Decision and Opinion of United States Court of Appeals for the Tenth Circuit entered on July 20, 1992 ..... App. 1

Order of United States Court of Appeals for the Tenth Circuit entered on August 28, 1992 .... App. 17

Order Denying Motion to Dismiss of the United States District Court for the District of Wyoming entered on May 20, 1990 ..... App. 19

Order Granting Preliminary Injunction of the United States District Court for the District of Wyoming entered on March 21, 1991 ..... App. 24

Selected statutes from Federal Mine and Safety Act of 1977 ..... App. 31

Selected regulations promulgated under Federal Mine and Safety Act of 1977 ..... App. 35

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

THUNDER BASIN COAL COMPANY, Plaintiff-Appellee, v. LYNN MARTIN, as SECRETARY, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR, WILLIAM J. TATTERSALL, as ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY & HEALTH; WILLIAM HOLGATE, as DISTRICT MANAGER COAL MINE SAFETY AND HEALTH, DISTRICT 9, MINE SAFETY AND HEALTH ADMINISTRATION, MINE SAFETY AND HEALTH ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF LABOR, Defendants-Appellants.	)	No. 91-8029 (Filed Jul. 20, 1992)

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 91-0050-B)

Colleen A. Geraghty, Attorney (David S. Fortney, Deputy Solicitor of Labor; Edward P. Clair, Associate Solicitor; W.

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Charles W. Newcom of Sherman & Howard, Denver, Colorado (Thomas F. Linn of Atlantic Richfield Company, Denver, Colorado, with him on the brief) for Plaintiff-Appellee.

Before LOGAN and TACHA, Circuit Judges, and COOK, District Judge.*

LOGAN, Circuit Judge.

Defendants-appellants, including the United States Secretary of Labor and the Mine Safety and Health Administration (MSHA), seek to overturn a preliminary injunction granted by the district court enjoining the Secretary of Labor from enforcing 30 C.F.R. pt. 40 against plaintiff-appellee Thunder Basin Coal Company (Thunder Basin). Although the parties discuss several issues concerning the propriety of the district court's grant of the preliminary injunction, we need address only one: whether the district court had subject matter jurisdiction to grant injunctive relief from enforcement of a regulation under Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. §§ 801, *et seq.*

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* The Honorable H. Dale Cook, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

I

30 C.F.R. pt. 40 is a regulation issued under the Mine Act that establishes the procedure and administrative requirements for designation of a miner representative under the Act. *See* 30 U.S.C. § 813(f). The Mine Act requires frequent inspections of mines to gather and disseminate health and safety information and to determine compliance with health and safety standards. *Id.* § 813(a). A miner representative has the right to accompany the MSHA inspector on such inspections and the right to obtain an immediate inspection of the mine by MSHA if the representative has "reasonable grounds to believe that a violation of [the Mine Act] or a mandatory health or safety standard exists, or an imminent danger exists." *Id.* § 813(g)(1). The miner representative also enjoys other rights under the Mine Act. *See id.* § 819(b) (representative receives "copy of any order, citation, notice, or decision required by [the Mine Act]"); *id.* §§ 815(d), 817(e) (may contest issuance, modification, or termination of an order); *id.* § 813(f) (representative may participate in pre- or post-inspection conferences). Under the Mine Act, a miner representative may be a nonemployee of the mine being inspected. *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447, 450 (10th Cir. 1990) (interpreting § 813(f)).

Thunder Basin operates a large coal mine with a nonunion work force. Certain of Thunder Basin's employees, exercising their rights under the Mine Act,

designated two nonemployees to be their miner representatives.[1] These nonemployees of the mine were employees of the United Mine Workers of America (UMWA). Thunder Basin alleges that designation of the UMWA employees as miner representatives is an abuse of 30 C.F.R. pt. 40 because it is nothing more than a calculated attempt to forward the UMWA's efforts to unionize plaintiff's mine. Thunder Basin argues that requiring it to allow the UMWA employees access to its property and records in connection with an inspection violates its rights under the Labor Management Relations Act (LMRA), 29 U.S.C. § 141, *et seq.*, to exclude union employees from access to Thunder Basin's records and property. It further argues that its constitutional due process rights would be violated if it is forced to risk substantial penalties before the merits of its legal arguments are heard.

II

Whether a district court has subject matter jurisdiction is subject to de novo review. *See City of Chanute, Kan. v. Williams Natural Gas Co.*, 955 F.2d 641, 658 (10th Cir. 1992).

The federal district courts are courts of limited jurisdiction. *See, e.g., Finley v. United States*, 490 U.S. 545, 547-48 (1989); *City of Tacoma v. Taxpayers*, 357 U.S. 320, 336

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[1] As few as two miners may designate a mine representative. 30 C.F.R. pt. 40.1(b)(1). This provision helps assure representation of all miners, including members of minority groups and miners who may not be in total harmony with their co-workers.

(1958). Congress may grant review of actions taken under a specific statute to an administrative agency, rather than to federal district courts. *See Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419-20 (1965). "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984). Specifically in context of the Mine Act we have held that

> a legislative intent that district courts are not to exercise jurisdiction over particular matters may be implied by the context of an *entire* legislative scheme and that clear and convincing evidence of a legislative intent that district courts should not exercise jurisdiction over particular matters is sufficient to bar such jurisdiction, especially where other avenues of review are available.

American Coal Co. v. United States Dep't of Labor, Mine Safety & Health Admin., 639 F.2d 659, 662 (10th Cir. 1981) (citing with approval holding in *Bituminous Coal Operators' Ass'n v. Marshall*, 82 F.R.D. 350, 352 (D.D.C. 1979)) (emphasis in original).

The Mine Act provides an extensive review process for challenges to actions taken under the Act. The usual procedure when a company refuses to comply with 30 C.F.R. pt. 40 is that it receives a citation, *see* 30 U.S.C. § 814(a), then an order, *see id.* § 814(b), and a proposed assessment of penalty, *see id.* §§ 815(a), 820. A citation, order, or proposed assessment of penalty may be contested before an administrative law judge (ALJ), *id.*

§ 815(a)(d), and thereafter appealed to the Federal Mine Safety and Health Review Commission (the Commission) for its discretionary review. *Id.* § 823(d)(2)(A)(i). After exhausting these administrative remedies, the Mine Act allows appeal of the Commission's final decision to a United States court of appeals whose factual review is limited to the administrative record.[2] *Id.* § 816(a)(1).

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[2] 30 U.S.C. § 816(a)(1) states in relevant part:

> Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. . . . Upon such filing, the court shall have exclusive jurisdiction of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. . . . [T]he jurisdiction of the court shall be exclusive and its judgment and degree [sic] shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28.

Id. (footnote omitted).

Thunder Basin, apparently to avoid a citation, order, and proposed assessment of penalty, filed a complaint in federal district court seeking an injunction. The district court granted a preliminary injunction preventing defendants from enforcing 30 C.F.R. pt. 40.[3] The district court found that the administrative review provided by the Mine Act was unnecessary in the instant case; that the agency has no special expertise to determine the alleged conflict between LMRA and MSHA or plaintiff's constitutional due process claim. *See* Order Denying Motion to Dismiss at 3-4, Appendix at 37-38.

This court, in *American Coal,* held that the Mine Act grants district courts subject matter jurisdiction in only the limited circumstances enumerated in 30 U.S.C. §§ 818, 820, and that actions taken under the Act should be challenged initially before the administrative agency in accordance with the administrative review procedures outlined in 30 U.S.C. § 816. *See* 639 F.2d at 660-62; *accord Council of S. Mountains, Inc. v. Donovan,* 516 F. Supp. 955, 959 (D.D.C. 1981); *United States Steel Corp. v. Marshall,* 471 F. Supp. 438 (W.D. Pa. 1979); *Bituminous Coal Operators' Ass'n v. Marshall,* 82 F.R.D. at 352-54. We based our holding on Congress' clear intent as evidenced by both the plain language of the Mine Act as a whole and the Act's

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[3] The preliminary injunction has now been made a final injunction. We have before us Thunder Basin's motion to stay our determination of the appeal of the preliminary injunction and for its consolidation with the appeal of the permanent injunction. Because the parties had ample opportunity to argue the dispositive jurisdictional issue, we deny the motion for stay and consolidation.

legislative history. 639 F.2d at 660. We reaffirm that holding today.

The district court's view, allowing subject matter jurisdiction of Mine Act claims alleging constitutional violations and statutory conflict, finds support in *Southern Ohio Coal Co. v. Donovan*, 774 F.2d 693, 700 (6th Cir. 1985), *amended*, 781 F.2d 57 (6th Cir. 1986). *Accord Zeigler Coal Co. v. Marshall*, 502 F. Supp. 1326, 1329-30 (S.D. Ill. 1980) (claim that § 815(c) violates plaintiff's constitutional due process rights may be determined by district court). In *Southern Ohio*, the Sixth Circuit held that district courts have jurisdiction to determine constitutionality of Mine Act rules and procedures, stating three reasons: (1) the Mine Act does not expressly deny district courts jurisdiction, 774 F.2d at 700; (2) "[q]uestions concerning the constitutionality of rules or statutes . . . are not the type of questions that are within an agency's domain of expertise," and therefore the purpose for requiring initial review by the administrative agency is not served, *id.*; and (3) there is a "distinction between claims arising under an act and claims concerning the act itself," *id.*

This court rejected the first of *Southern Ohio's* justifications in *American Coal*. *See* 639 F.2d at 661-62. As to the others, we note that the Mine Act, in granting jurisdiction to ALJs, the Commission, and the courts of appeals, does not limit the bases upon which a party may challenge a citation, order or proposed assessment; the Act does not distinguish between challenges to orders based on constitutional grounds or conflict with other statutes and challenges based on misapplication of the Act itself. The Commission has demonstrated that it will consider constitutional challenges to the Mine Act. *E.g.*, *Secretary of*

Labor, Mine Safety & Health Administration (MSHA) v. Richardson, 3 F.M.S.H.R.C. 8, 18-21 (1981) ("It is our belief that the judicial role of the Commission . . . permits the Commission to entertain constitutional objections to the underlying statute, especially where, as here, review in a United States court of appeals is available."), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982); *Secretary of Labor, Mine Safety & Health Admin. (MSHA) v. Alabama By-Products Corp.*, 4 F.M.S.H.R.C. 2128, 2129 (1982) (considering claim that regulation was unconstitutionally vague). ALJs and the Commission may not enjoy any special expertise enabling them to decide constitutional challenges to the Mine Act and construction of the Act with other laws, but review by the court of appeals is also part of the statutory scheme and that review is adequate to address both constitutional challenges and questions of conflict with other statutes. *See United States Steel*, 471 F. Supp. at 440 (Congress intended that constitutional and legal challenges to the Mine Act be heard by the courts of appeals and not the district courts); *Utah Power & Light*, 897 F.2d at 452 (following administrative appeals, court rejected argument that MSHA's interpretation of § 813(f) allowing nonemployee miner representatives violated operator's property rights).

Although we need not go beyond the precedent of *American Coal* and the language of the Act, we note that the Mine Act's legislative history lends special support to the view that Congress intended to strictly limit district courts' jurisdiction over Mine Act disputes. Among the motivations for enacting the Mine Act were concerns that the old laws did "not provide means to react quickly enough to newly manifested health hazards" and that

civil penalties were "paid much too long after the underlying violation to effectively induce meaningful operator compliance." S. Rep. No. 181, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3408. The report specifically pointed to de novo trials in the district courts involving challenges to penalties as a reason for the delays and resulting inefficiencies under the prior laws.[4] In discussing the grant of jurisdiction to the courts of appeals, the report noted the "intention that penalty litigation move with no undue delay." *Id.* at 3440.

That Thunder Basin has not yet received a citation or proposed assessment of penalty is not controlling; the gravamen of Thunder Basin's case is a dispute over an anticipated citation and penalty. *See Bituminous Coal,* 82

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[4] The Senate report explains:

> The Committee firmly believes that to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation. A number of problems with the current penalty assessment and collection system interfere with this. Final determinations of penalties are not self-enforcing, and operators have the right to seek judicial review of penalty determinations, and may request a de novo trial on the issues in the U.S. District Courts. This encourages operators who are not predisposed to voluntarily pay assessed penalties to pursue cases through the elaborate administrative procedure and then to seek redress in the Courts. Since the District Courts are still reluctant to schedule trials on these cases, and the Department of Justice has been reluctant to pursue such cases in the courts, the matters generally languish at that stage, and the penalties go uncollected.

S. Rep. No. 181, 95th Cong., 1st Sess. 16 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3416.

F.R.D. at 351, 354 (finding no jurisdiction over preenforcement challenge). Operators may not avoid the Mine Act's administrative review process simply by filing in a district court before actually receiving an anticipated citation, order, or assessment of penalty. *Cf., e.g., Southern Pines Assocs. v. United States,* 912 F.2d 713 (4th Cir. 1990) (no preenforcement challenges to EPA action under Clean Water Act); *Union Elec. Co. v. EPA,* 593 F.2d 299, 304-05 (8th Cir.) (no preenforcement challenges to EPA action under Clean Air Act), *cert. denied,* 444 U.S. 839 (1979).

Permitting district court jurisdiction on the basis of claims of constitutional violations or conflict with other statutes would permit preemptive strikes that could seriously hamper effective enforcement of the Act, disrupting the review scheme Congress intended. Challenges to regulations and provisions under the Mine Act are easily characterized in constitutional terms and as conflicting with other statutes. *See, e.g., Utah Power & Light,* 897 F.2d at 452 (argument that allowing nonemployees walkaround rights under § 813(f) infringes property rights); *United States Steel,* 471 F. Supp. at 439 (plaintiff alleged that complaint involving the Mine Act arose under the Fourth, Fifth, Sixth and Eighth Amendments and Administrative Procedure Act); *Bituminous Coal,* 82 F.R.D. at 352 (plaintiff claimed, inter alia, that bulletin giving interpretations of § 813(f) was in violation of 5 U.S.C. § 553 and was unconstitutional).

III

We believe the Mine Act's review procedures are adequate to protect Thunder Basin's due process rights. A

party, by disobeying the Mine Act or a regulation and then challenging the citation, order, or proposed penalty, is only penalized if the party loses on the merits of its claim. Thus a full and adequate hearing is provided before any penalty actually is imposed. *See Nichiro Gyogyo Kaisha, Ltd. v. Baldrige,* 594 F. Supp. 80, 83 (D.D.C. 1984). Moreover, the Commission in determining the appropriate penalty must consider "the gravity of the violation," and "good faith . . . in attempting to achieve rapid compliance." 30 U.S.C. § 820(i). If a party, in good faith, violates a regulation or provision of the Mine Act that in no way endangers the safety of its miners and challenges, albeit unsuccessfully, the citation, order, or proposed penalty through the proper procedure, such a violation is unlikely to prompt or support a substantial penalty. *See Bituminous Coal,* 82 F.R.D. at 354 ("[I]t would seem improbable that stiff supplemental civil penalties would be imposed where a genuine interpretative question was raised as to section [813](f), a provision which normally is not absolutely vital to human health and safety."). The Commission itself has said as much in a case factually close to the one before us, based in part on representations by the Secretary of Labor. *See Secretary of Labor, Mine Safety & Health Admin. (MSHA) v. Mid-Continent Resources, Inc.,* 12 F.M.S.H.R.C. 949, 957 (1990).[5] In the instant case,

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[5] The opinion stated:

> Further, given the Secretary's assurance that, in the event of an operator's failure to abate an alleged violation of section 103(f) [30 U.S.C. § 813(f)], withdrawal of miners will not ordinarily occur, it should not be expected that she would take the more extreme enforcement action of attempting to threaten to impose civil penalties upon a noncompliant operator pursuant to section 110(b) of the Act, 30 U.S.C. § 820(b), or criminal penalties pursuant to section 110(d) of the Act, 30 U.S.C. [§] 820(d). We therefore believe that the fears in this regard expressed by counsel of Mid-Continent are not well-founded.

Secretary of Labor, Mine Safety & Health Admin. (MSHA) v. Mid-Continent Resources, Inc., 12 F.M.S.H.R.C. 949, 957 (1990).

the Secretary has made assurances that criminal penalties under these circumstances are unlikely. *See* Brief for the Secretary of Labor at 33-34. 30 U.S.C. § 820(d) imposes criminal penalties only in the event of a willful violation or knowing refusal to comply. *See Bituminous Coal,* 82 F.R.D. at 354 ("It should also be pointed out that an operator that pursued the prescribed route of review would in no way run the risk of criminal prosecution."); *see also Wagner Seed Co. v. Daggett,* 800 F.2d 310, 316 (2d Cir. 1986) (willful "traditionally is synonymous with bad faith").

Thunder Basin points to defendants' actions concerning another nearby mine operator facing the same factual situation as is before us. There operator Kerr McGee Coal Corporation was threatened with the possibility of maximum daily penalties under 30 U.S.C. § 820(b) if it did not abate the violation. *See* Appendix 242-46. Threats of such penalties in the face of a bona fide interpretive dispute are indeed troubling. Such daily penalties, however, may be constitutionally valid so long as the operator "is accorded adequate opportunity to challenge their assessment at the administrative level before payment must begin." *Duquesne Light Co. v. EPA,* 698 F.2d 456, 469-70 n.14 (D.C. Cir. 1983). Also, although imposition of such a

penalty was recommended by the district manager to the central office, whether central office actually approved the penalty is not clear; Kerr McGee abated the violation before the penalty was imposed. Appendix at 247. It seems questionable that either the Commission or a court of appeals would sustain a significant penalty on appeal even if approved by MSHA. *See* 29 C.F.R. § 2700.29(b) (ALJ and Commission not bound by penalty recommended by Secretary); *Sellersburg Stone Co. v. Federal Mine Safety & Health Review Comm'n*, 736 F.2d 1147, 1151-52 & n.11 (7th Cir. 1984) (same).

In any event, Thunder Basin may have the merits of its claims decided without risking substantial daily penalties. After receiving a citation it can abate the violation by complying, while proceeding with the appeals process. *See Bituminous Coal*, 82 F.R.D. at 354. Alternatively, if plaintiff chooses not to comply with an MSHA order, apparently it may still avoid risking daily penalties by pursuing an expedited hearing that requires only four days notice. *See* C.F.R. § 2700.52.

Further, we believe that a miner representative acting within the scope of his or her duties as defined in the Mine Act will not cause irreparable injury to plaintiff while plaintiff's litigation is pending. *See Utah Power & Light*, 897 F.2d at 452 ("the Act clearly spells out the purpose of a miners' representative's participation in an inspection"). We have no reason to assume that MSHA would allow the UMWA miner representatives to act beyond the scope of their rights outlined in the Mine Act.

We conclude that the review provided for by Congress is adequate and exclusive.[6]

Utah Power & Light, 897 F.2d at 447, relied upon by Thunder Basin, is in no way inconsistent with the result reached here. In *Utah Power & Light* we held that a miner representative need not be an employee of the mine under § 813(f). *Id.* at 452. We referenced a hypothetical situation in which a UMWA employee might be named a miner representative "for purposes unrelated to the Act's safety objectives and thereby constitut[ing] an inappropriate exercise of the UMWA's designation right under § [813](f)." *Id.* (citation omitted). We stated that if

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[6] In arguing that the administrative remedy is inadequate Thunder Basin relies in part upon *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967). In *Gardner* the Supreme Court permitted preenforcement judicial review of three regulations under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301, *et seq.* after finding that nothing in the Act precluded such review. *Id.* at 168. The Court found that refusal to comply in order to challenge the regulations would result in exposure to "extensive" penalties and subject plaintiffs to possible criminal, seizure or injunctive suits. *Id.* at 172. The Court also recognized the "disastrous impact of an announcement that [plaintiffs'] cosmetics ha[d] been seized as 'adulterated,' " *id.*, would have had upon plaintiffs' public good will. If plaintiffs did comply with the regulations and instead sought premarketing approval, the costs to plaintiffs allegedly would have been tens of millions of dollars. *Id.* at 173. Thus, the Court found that requiring compliance and foreclosing review at the preenforcement stage would inflict irreparable injury on plaintiffs. *Id.* at 173-74. In the instant case the threatened penalties and consequences of requiring postenforcement review are not nearly as severe as those in *Gardner*, and the alternative to risking significant penalties in the instant case would not result in irreparable injury to Thunder Basin.

§ 813(f) was being abused, an operator's solution would be to "take action against individual instances of abuse when it discovers them." *Id.* We did not suggest that a district court would be the proper forum for taking action against such abuse. Instead, the operator must follow the procedures outlined in the Act. It can raise its concerns with MSHA; if MSHA still believes the designation is appropriate and the operator refuses to comply, it can get a citation and raise the issues before the ALJ, the Commission and a court of appeals.

The judgment of the district court is VACATED, and the case is REMANDED with instruction to dismiss the action for lack of subject matter jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THUNDER BASIN COAL COMPANY,	)	
Plaintiff-Appellee,	)	No. 91-8029
v.	)	
LYNN MARTIN, as SECRETARY, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; WILLIAM J. TATTERSALL, as ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY & HEALTH; WILLIAM HOLGATE, as DISTRICT MANAGER COAL MINE SAFETY AND HEALTH, DISTRICT 9, MINE SAFETY AND HEALTH ADMINISTRATION; MINE SAFETY AND HEALTH ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF LABOR,	)	
Defendants-Appellant	)	

ORDER

Entered August 28, 1992

Before LOGAN and TACHA, Circuit Judges, and COOK, District Judge.*

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*Honorable H. Dale Cook, Senior United States District Judge for the Northern District of Oklahoma, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for for [sic] rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

THUNDER BASIN COAL COMPANY, Plaintiff, vs. LYNN MARTIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, WILLIAM J. TATTTERSALL, as ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY AND HEALTH; WILLIAM HOLGATE, as DISTRICT MANAGER, COAL MINE SAFETY AND HEALTH, DISTRICT 9, MINE SAFETY AND HEALTH ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF LABOR, Defendants.	)	(Filed May 20, 1991) No. 91-CV-0050-B

ORDER DENYING MOTION TO DISMISS

This matter comes before the Court on defendants' Secretary of Labor and Mine Safety and Health Administration's motion to dismiss complaint. The Court, having considered the materials on file both in support of and in opposition to the motion, having considered the arguments of counsel, and being fully advised in the premises, FINDS and ORDERS as follows:

Discussion

A complete background of this case may be found in this Court's March 21, 1991 order granting preliminary injunction, and thus need not be reiterated here.

Defendants move to dismiss, arguing two main claims: 1) this Court lacks subject matter jurisdiction over this action, as the Mine Act, 30 U.S.C. § 801 *et seq.*, vests exclusive jurisdiction over alleged Mine Act violations in the Federal Mine Safety and Health Review Commission (Commission), and plaintiff therefore may seek redress through that administrative channel only; and 2) alternatively, plaintiff, by bringing the present action in this Court, has failed to exhaust its available administrative remedies, and must do so first before this Court may maintain jurisdiction.

In support of their claim that this Court lacks subject matter jurisdiction, defendants rely primarily on *American Coal Co. v. United States Dept. of Labor, et al.*, 639 F.2d 659 (10th Cir. 1981). In *American Coal*, a Mine Safety and Health Administration (MSHA) coal mine inspector cited a mine operator for a safety violation, and the operator brought an action for declaratory and injunctive relief in federal district court, which dismissed the complaint. On appeal, the Tenth Circuit held that "disputed cases arising under the new mine safety act" should be adjudicated first before one of the Commission's Administrative Law Judges; from the ALJ, an aggrieved party may appeal to the Commission, whose decision may in turn be reviewed by the United States Court of Appeals. *Id.* at 661. If this case only involved a violation or interpretation of a MSHA regulation, *American Coal* would require this Court

to dismiss this action. However, this dispute implicates more than merely a MSHA regulation.

Plaintiff's recurrent argument is that a conflict exists between the Labor Management Relations Act (LMRA) and MSHA, and that the Secretary of Labor's intended resolution of it through standard MSHA administrative procedures would violate plaintiff's procedural due process rights. Additionally, plaintiff argues that the Commission has no expertise to resolve a statutory conflict between MSHA and LMRA. Given such statutory conflict, and the allegation of a constitutional violation, plaintiff claims that this Court is the appropriate forum to resolve this matter. This argument is compelling.

This case presents issues of first impression in the Tenth Circuit. *Southern Ohio Coal Co. v. Donovan, et al.*, 774 F.2d 693 (6th Cir. 1985) is most analogous to the case at bar. In *Southern Ohio*, coal mine operators brought suit in district court, alleging that certain procedural requirements of MSHA violated their due process rights. On appeal, the Sixth Circuit held that the district court had properly exercised initial jurisdiction, as the administrative review process created by the Mine Act was inadequate to adjudicate constitutional challenges.

> Under the Mine Act, the courts of appeals and not the district courts have jurisdiction to review the Commission's orders. 30 U.S.C. § 816. *The Act, however, does not expressly preclude district court jurisdiction.* . . . [W]hen the issue to be adjudicated is one that is within the domain of agency expertise, then the statutorily provided judicial review procedure is exclusive. *Questions concerning the constitutionality of rules*

> *or statutes, however, are not the type of questions that are within an agency's domain of expertise. Rather, responsibility to deal with questions of constitutional interpretation lies in the federal courts, both at the trial and appellate levels.*

Id. at 700 (emphasis added).

Under *Southern Ohio,* the allegation of a constitutional violation alone would remove the matter from Commission review. In this case, plaintiff alleges both a due process violation and a statutory conflict between the LMRA and MSHA. If anything, this matter presents a more compelling case for the exercise of district court jurisdiction, as the added issue of statutory conflict further diminishes the value of any specific agency expertise which the Commission might provide.

Defendants' additional argument that plaintiff has failed to exhaust its administrative remedies is similarly unpersuasive. Under *Mathews v. Eldridge,* 424 U.S. 319 (1976), a party need not exhaust his administrative remedies prior to a district court entertaining constitutional challenges to an agency's procedures. Furthermore, the exhaustion doctrine is not implicated here, as "its purpose is to permit an administrative agency to apply its special expertise in interpreting relevant statutes and in developing a factual record without premature judicial intervention." *Southern Ohio,* 774 F.2d at 702. As the above discussion demonstrates, this matter involves issues which are beyond the purview of the Commission, and are thus best resolved by this Court.

For these reasons, the defendants' motion to dismiss complaint is DENIED.

THEREFORE IT IS

ORDERED that the defendants' motion to dismiss complaint be, and the same hereby is, DENIED.

Date this 17th day of May, 1991.

/s/ Clarence A. Brimmer, Jr.
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

THUNDER BASIN COAL COMPANY, Plaintiff, vs. LYNN MARTIN, as SECRETARY, UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; WILLIAM J. TATTERSALL, as ASSISTANT SECRETARY OF LABOR FOR MINE SAFETY & HEALTH; WILLIAM HOLGATE, as DISTRICT MANAGER COAL MINE SAFETY AND HEALTH, DISTRICT 9, MINE SAFETY AND HEALTH ADMINISTRATION; MINE SAFETY AND HEALTH ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF LABOR, Defendants.	)	NO. 91-CV-0050-B (Filed Mar. 21, 1991)

ORDER GRANTING PRELIMINARY INJUNCTION

This matter comes before the Court on plaintiff's motion for a temporary restraining order and request for preliminary and permanent injunction. The Court, having considered the materials on file both in support of and in opposition to the motion, having considered the arguments of counsel, and being fully advised in the premises, FINDS and ORDERS as follows:

Background

Plaintiff operates the Black Thunder Mine located east of Wright, Wyoming. In 1987, Black Thunder employees, voting under the provisions of the Labor Management Relations Act (LMRA), rejected United Mine Workers of America (UMWA) union representation by a vote of 307-56. Black Thunder remains today a nonunion mine.

However, under 30 C.F.R. Part 40, the regulations promulgated pursuant to the provisions of the Mine Safety and Health Act (MSHA), a "representative of miners" may be designated by as few as two or more miners. Such a representative has "walkaround" rights, and thus may accompany MSHA mine inspectors on their safety inspection of the mine operation. This representative of miners may be a nonemployee of the mine operator. *Utah Power and Light Co. v. Secretary of Labor*, 897 F.2d 447, 452 (10th Cir. 1990).

Two or more Black Thunder employees have apparently invoked this MSHA regulation, and designated a UMWA representative for walkaround purposes. This prompted plaintiff's present request for relief, as plaintiff claims the rejection of the UMWA by Black Thunder employees under the LMRA can not now be circumvented by the conflicting MSHA regulations which provide the UMWA with access and entry to Black Thunder facilities. Plaintiff therefore seeks both a temporary restraining order and a preliminary injunction restraining defendants from enforcing MSHA because of plaintiff's refusal to comply with 30 C.F.R. Part 40, pending a hearing and determination as to whether UMWA can be a

proper representative under 30 C.F.R. Part 40 without first having been elected as a representative under the LMRA.

Discussion

On March 11, 1991 plaintiff filed its verified complaint seeking preliminary and permanent injunctions, along with its separate motion for a temporary restraining order. The defendants were given notice of the hearing on the temporary restraining order, and counsel for both sides were present and offered argument and evidence at that hearing. The Court therefore will treat this as a motion for preliminary injunction pursuant to Fed. R. Civ. P. 65.

Preliminary Injunction

"The main purpose of a preliminary injunction is simply to preserve the status quo pending the outcome of the case." *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) (citing *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1185 (10th Cir. 1975)). The Court may issue a preliminary injunction if the plaintiff establishes:

> (1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.

Hartford House, Ltd. v. Hallmark Cards, Inc., 846 F.2d 1268, 1270 (10th Cir. 1988) *cert. denied*, 109 S.Ct. 260 (1988) (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)). When the last three requirements are met, a movant may satisfy the likelihood of success on the merits requirement by raising serious questions going to the merits. *Tri-State*, 805 F.2d 351 (10th Cir. 1986) (citing *Otero Sav. & Loan Association v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981)).

1. *Likelihood of success on the merits:*

The Tenth Circuit elaborated on this requirement in *Tri-State:*

> The Tenth Circuit has adopted the Second Circuit's liberal definition of the "probability of success" requirement. When the other three requirements for a preliminary injunction are satisfied, 'it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.'

Id. at 358 (quoting *Otero Sav. & Loan Association v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981). Plaintiff does not claim it will succeed on the merits; instead, plaintiff raises the difficult question of how it is to act given the conflict between the LMRA and the regulations promulgated under MSHA, 30 C.F.R. Part 40. As neither party has directed this Court to any authority which construes this statutory conflict, it therefore appears as a matter of first impression to both this Court and the Tenth Circuit, and thus merits a full investigation.

2. *Irreparable injury to movant:*

Plaintiff has established that it will be forced to admit UMWA representatives to its facilities if 30 C.F.R. Part 40 is enforced. Plaintiff has also shown that the UMWA's alleged interest in mine safety and health may be merely a ruse for gaining entry to plaintiff's Black Thunder property to attempt union organization efforts. Such potential abuse of MSHA by the UMWA poses the risk of serious harm to plaintiff. Additionally, plaintiff has demonstrated that it will be subject to considerable fines and penalties, some levied on a daily basis, if it stands on its LMRA rights and refuses to post the UMWA representative designation. Plaintiff could seek administrative remedies, but only after a MSHA citation had issued, and would be forced to proceed through administrative channels while such penalties accrued. Given this situation, it is apparent that plaintiff may suffer irreparably without injunctive relief.

3. *Balancing of injuries:*

The nature and extent of plaintiff's injuries are outlined above. Defendants' claim they will be injured if this Court steps in and interrupts the administrative process which is, in their view, the only appropriate avenue to resolve this dispute. Defendants claim they will be injured by the precedent that will be set by such an interruption. Defendants also claim those Black Thunder miners who have made the UMWA designation will be injured if this Court denies them their right to their chosen representative. This Court is interrupting the normal administrative process precisely because this specific statutory conflict has not previously been addressed, and

administrative remedies are inadequate here. Defendants' concern over precedent must be subordinated to the substantive rights of the parties which are jeopardized by this unresolved conflict. As regards the individual miner's rights under MSHA to have their representative of choice, this Court is in no way limiting that right. While this preliminary injunction is in effect, the MSHA safety and health interests of these miners will be adequately addressed by those other non-UMWA representatives previously designated who have walkaround rights, and who thus may accompany mine inspectors. Additionally, this preliminary injunction is only meant to preserve the status quo pending a final resolution of the primary statutory conflict at issue; miners' rights to have UMWA walkaround representation are not permanently affected by this Court's order.

4. *Public interest:*

The overriding public interest consideration in this matter is the resolution of the statutory conflict between the LMRA and the regulations promulgated under the MSHA, 30 C.F.R. Part 40. As such, the public interest is best served by granting plaintiff's request for preliminary injunction pending a resolution of this conflict.

5. *Security:*

Pursuant to Fed. R. Civ. P. 65(c), plaintiff, as the applicant, must furnish security in such sum as the Court deems proper in order for the requested preliminary injunction to issue. The Court hereby sets this sum at one thousand dollars ($1,000.00), unsecured, and plaintiff shall forthwith post a signature bond in this amount with

this Court's registry for the payment of such costs and damages as may be incurred or suffered by any party.

THEREFORE IT IS

ORDERED that plaintiff's request for a preliminary injunction be, and the same hereby is, **GRANTED**, and defendants are hereby enjoined from enforcing 30 C.F.R. Part 40 against plaintiff until further order from this Court. It is further

ORDERED that plaintiff shall forthwith post a bond with this Court's registry as indicated above.

Dated this 21st day of March, 1991.

/s/ Clarence A. Brimmer, Jr.
CHIEF JUDGE,
UNITED STATES
DISTRICT COURT

FEDERAL MINE SAFETY AND HEALTH ACT OF 1977

§ 816. Judicial review of Commission orders

(a) Petition by person adversely affected or aggrieved; temporary relief

(1) Any person adversely affected or aggrieved by an order of the Commission issued under this chapter may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or in the United States Court of Appeals for the District of Columbia Circuit, by filing in such court within 30 days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of the questions determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to

the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Commission may modify or set aside its original order by reason of such modified or new findings of fact. Upon the filing of the record after such remand proceedings, the jurisdiction of the court shall be exclusive and its judgment and degree[1] shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28.

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§ 820. Penalties

(a) Civil penalty for violation of mandatory health or safety standards

The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $50,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense.

(b) Civil penalty for failure to correct violation for which citation has been issued

Any operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than $5,000 for each day during which such failure or violation continues.

(c) Liability of corporate directors, officers, and agents

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 815(c) of this title, any director, officer, or agent of such corporation who knowingly authorized, order, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

(d) Criminal penalties

Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title and section 817 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 815(c) of this title, shall, upon conviction, be punished by a fine of not more

than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or both.

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30 C.F.R. PART 40 – REPRESENTATIVE OF MINERS

§ 40.1 Definitions.

As used in this Part 40:

(a) "Act" means the Federal Mine Safety and Health Act of 1977.

(b) "Representative of miners" means:

(1) Any person or organization which represents two or more miners at a coal or other mine for the purposes of the Act, and

(2) "Representatives authorized by the miners", "miners or their representative", "authorized miner representative", and other similar terms as they appear in the Act.